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Supreme Court of the United States

October Term, 1962

No. 767

FRANK W. LEWIS and LOLA G. LEWIS,

Petitioners,

against

NEW JERSEY EXPRESS CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No.

FRANK W. LEWIS and LOLA G. LEWIS,
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NEW JERSEY EXPRESS CORPORATION,
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PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Opinions Below

The opinions below are unreported. The opinion of the Court of Appeals for the Third Circuit is appended herein at 1a-2a.* The oral opinion of the District Court (District of New Jersey, Hon. Thomas F. Meaney, U. S. D. J.), on the denial of petitioners' motion to set aside the verdict is set forth at 37b-38b, defendant-appellee's appendix to its brief to the Court of Appeals for the Third Circuit.

Jurisdiction of this Court

The judgment of the Court of Appeals is dated, and was entered, October 22, 1962.

The jurisdiction of this court is invoked under 28 U. S. C. 1254 (1).

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* "a" references are to pages of the appendix herein.

Question Presented

Whether, under present federal practice, a Court of Appeals has the power and/or the duty to correct a miscarriage of justice, or are pure technicalities, in this instance failure to move for a directed verdict or take exception to the trial court's charge, to be so exalted as to prevent a Court of Appeals from correcting a miscarriage of justice.

In the absence of an issue of fact as to the proximate cause of the accident, is it the function of the trial court to pass upon the question as one of law, in the absence of a motion for a directed verdict or is the court under such circumstances bound to submit the issue to a jury as a question of fact.

Is a Court of Appeals bound to sustain self imposed limitations by a trial court, as held by the court below, or is the contrary holding correct, as enunciated in the case of *Aetna Casualty & Surety Co.* v. *Yeatts*, 122 F. 2d 350, 354.

Laws Involved

28 U. S. C. 2106:

"Sec. 2106. DETERMINATION

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 646, 62 Stat."

Statement of the Case

District Court jurisdiction was predicated on diversity.

Petitioners are husband and wife. They were traveling in the husband's owner-driven car, with the wife as the sole passenger, on a public 2 lane highway in New Jersey (i.e. one lane for each direction of traffic).

Respondent's truck, traveling in the opposite direction, suddenly turned left, without notice or warning to petitioners, crossed the solid double white line in violation of State law and cut across petitioners' lane immediately in front of petitioners' oncoming car, causing the vehicles to collide with resultant severe injuries to petitioners and total loss of the car.

On the trial, the jury returned a verdict for the defendant.

Petitioners' motion to set aside the verdict and grant a new trial was denied. The Court of Appeals for the Third Circuit affirmed.

Reasons for Granting the Writ

A question of the highest importance in the evolution of the federal practice is presented for the exercise of this court's supervisory function, and for this court's determination whether, under the present liberalized practice, the federal courts have the power and/or the duty to administer justice to tort victims according to the merits, or are technicalities still so exalted as to prevent the federal courts from correcting a miscarriage of justice so that a tort victim's redress becomes dependent on the adroitness of counsel, rather than on the merits of the controversy.

The court below has enunciated a principle of law in conflict with the holding by the United States Supreme Court in the case of *Pope & Talbot* v. *Hawn*, 346 U. S. 406, 74 S. Ct. 202 that a mere technicality shall not be permitted

to defeat justice and, likewise, in conflict with the holding by his Court in *Metropolitan Railroad Co.* v. *Moore*, 121 U. S. 558, 570, 7 S. Ct. 1334, 1340, 40 L. Ed. 1022.*

POINT I

The Court of Appeals erroneously limited its power, and misapprehended its duty, to correct a miscarriage of justice.

Although only the judgment of the Court of Appeals is before this court on this petition, it may be helpful and enlightening to momentarily refer to the holding of the Dis-

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* "So, upon the whole evidence in the case, the testimony in support of the cause of action, or if the defense, may be so slight, although competent in law, or the preponderance against it may be so convincing, that a verdict may be seen to be plainly unreasonable and unjust. In many cases it might be the duty of the court to withdraw the case from the jury, or to direct a verdict in a particular way; and yet in others, where it would be proper to submit the case to the jury, it might become its duty to set aside the verdict and grant a new trial. That obligation, however, is the result of a conclusion of fact, and in such cases the ground of the ruling is, htat the verdict is not supported by sufficient evidence, because it is against the weight of the evidence."

This quotation is cited with approval in *Miller* v. *Pennsylvania Railroad Co.*, 161 F. Supp. 633, 641.

In the case of *Aetna Casualty & Surety Co.* v. *Yeatts*, 122 F. 2d 350, 352-353, 354, the Court stated:

"To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require."

This quotation is cited with approval in *Miller*, *supra*, at page 642.

This question is discussed at length by Judge Holtzoff in *United States* v. *Robinson*, 71 F. Supp. 9.

See also:

Montgomery Ward & Co. v. *Duncan*, 311 U. S. 243, 61 S. Ct. 189;

Foreman v. *Texas & New Orleans R. Co.*, 205 F. 2d 79.

trict Court on petitioners' motion to set aside the verdict and grant a new trial.

In ruling on this motion, the District Court stated (37b *):

> "* * * there was no exception taken to my charge and that therefore the matter was one for the determination of the jury. In the face of that I am compelled to deny your motion. I do not feel that (23) as a matter of law I can find that the defendant was guilty of negligence and therefore I refuse to upset the verdict of the jury."

(and continuing at 38b):

> "As I said, whether I agree with it or not isn't the question. It is a question of whether it shocks the conscience of the Court so that I should set it aside as against the weight of the evidence, or whether as a matter of law I find that the defendant was guilty of negligence."

It appears from the foregoing that the District Court erroneously applied the wrong yardstick to when a verdict should or could be set aside, the yardstick being when the verdict "shocks the conscience".

In *Grayson* v. *Deal*, 85 F. S. 431, it was said at page 435:

> "* * * A motion for a new trial is addressed to the judge's discretion, and he may consider the evidence as a whole, and weigh it, and if he thinks the jury was mistaken or that the verdict is wrong, although supported by some evidence, he should grant a new trial."

In *Byrd* v. *Blue Ridge, etc.*, 356 U. S. 525, 78 St. Ct 893, the court said, at page 540 of 356 U. S.:

> "The trial judge * * * has powers * * * to grant a new trial if the verdict appears to him to be against the weight of the evidence."

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* "b" references are to pages of defendant-appellee's appendix to its brief to the Court of Appeals.

It appears, therefore, that the District Court denied the motion because "there was no exception taken to my charge" (*supra*), and because the verdict did not shock the conscience of the court.

The Court of Appeals opinion noted that (2a):

> "There was no motion for a direction of verdict on behalf of the plaintiffs or objection to any part of the court's charge * * *."
>
> * * *
>
> "* * * The verdicts have a firm evidential basis. The trial judge rightfully refused to disturb them."

Apparently, therefore, the trial court based its ruling on the fact that the verdict did not shock its conscience, while the Court of Appeals based its ruling on the verdict having a firm evidential basis, thus apparently violating the precept that the reviewing court is required to base its decision on the grounds urged by the court below.

It further appears that the Court of Appeals felt that its power was limited because "There was no motion for a direction of verdict * * *" (*supra*), thus apparently overlooking the pertinent provisions of 28 U. S. C. 2106 enabling it to "require such further proceedings as may be just under the circumstances."

It therefore appears that the Court of Appeals (and the trial court) relied on an erroneous limitation of its power and duty and on the technicality of lack of a directed verdict motion to deny redress to petitioners.

Therefore, the question is raised on this petition whether technicalities may be so exalted (*U. S.* v. *Costello*, 275 F. 2d 355, 362) as to deny redress to a tort victim when the appellate court is charged with "the duty to see that there is no miscarriage of justice" (*Paramount Film Distributing Corp.* v. *Applebaum*, 217 F. 2d 101, 106).

CONCLUSION

Wherefore petitioners respectfully pray that this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit be granted and further pray that, on such review being had, this court will remand the cause for a new trial.

Respectfully submitted,

JACOB RASSNER,
Counsel for Petitioners.

APPENDIX

Opinion of the Court

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,909

FRANK W. LEWIS and LOLA G. LEWIS,
Plaintiffs-Appellants,

v.

NEW JERSEY EXPRESS CORPORATION,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued October 16, 1962

Before McLAUGHLIN and HASTIE, *Circuit Judges,* and DUMBAULD, *District Judge*

(Filed October 22, 1962)

PER CURIAM.

The automobile of appellant, Frank W. Lewis, operated by him and in which his wife, appellant, Lola G. Lewis, was a passenger, and the small automobile truck owned by and operated for appellee were in collision. Appellants,

alleging they had sustained personal injuries as a result thereof and that the car of appellant, Frank W. Lewis, had been damaged, brought this suit. Appellee counterclaimed for the damages to its truck. The case was tried to a jury and resulted in verdicts against the plaintiffs on their causes of action and in favor of the defendant on its counterclaim.

There was no motion for a direction of verdict on behalf of the plaintiffs or objection to any part of the court's charge which inter alia left to the jury the questions of whether one, both or neither of the drivers were guilty of negligence proximately contributing to the accident. Appellants' motion for a new trial was denied.

Appellants now urge that appellee was negligent as a matter of law; that there was no dispute of any substantial factual issue; that the trial judge erred in denying appellants' motion for a new trial because as he stated, "I do not feel that as a matter of law I can find that the defendant was guilty of negligence and therefore I refuse to upset the verdict of the jury" and that the verdicts were a miscarriage of justice.

The record unmistakably shows substantial eye-witness evidence that the accident involved was caused by the negligence of the appellant driver and that the operator of appellee's truck was not at fault. There is also evidence to the contrary. In the circumstances the district judge, most properly, submitted those factual questions to the jury. The verdicts have a firm evidential basis. The trial judge rightfully refused to disturb them.

The judgments of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,909

FRANK W. LEWIS and LOLA C. LEWIS,
Appellants.

vs.

NEW JERSEY EXPRESS CORPORATION.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present:

MCLAUGHLIN and HASTIE, *Circuit Judges*, and DUMBAULD, *District Judge*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of November 30, 1961 of the said District Court in this case be, and the same are hereby affirmed, with costs.

Attest:

s/ IDA O. CRESKOFF,
Clerk.

October 22, 1962.